

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION**

**JAKE SHAW, Individually and On
Behalf of All Others Similarly Situated,** §
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Plaintiff, §
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§
§
v. §
PERATON, INC. §
Defendant. §

PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR-REPLY

Plaintiff Jake Shaw (“Plaintiff”) on behalf of himself and all others similarly situated (“Class Members”) files this Motion for Leave to file a Sur-Reply in order to address arguments contained in Defendants’ Reply. A copy of the proposed Sur Reply is attached hereto as Exhibit A.

In its Reply, Defendant claims that Plaintiffs have not exhausted the requirement to mediate this matter. In reality, Plaintiffs' counsel has asked counsel for Defendant a number of times if Defendant would be interested in mediating this case. Exh. A to Plaintiff's Sur Reply. Counsel did not condition his request on either formal or informal mediation. *Id.* Counsel for Defendant replied that Defendant had no interest in formal mediation. Exh. B to Plaintiff's Sur Reply. The record needs to be correct to reflect that Plaintiff has tried to comply with the LOU's mediation requirement.

Moreover, while Defendant claims that Plaintiffs are well within their statute of limitations, this is irrelevant; Defendant neglects to inform this Court that under Fifth Circuit precedent, even *the filing of a claim* for arbitration does not toll limitations. That is because, under *Fonseca v. USG Ins. Servs.*, 467 Fed. Appx. 260 (5th Cir. 2012), “a demand for arbitration does not toll the

statute of limitation.” 467 Fed. Appx. at 261, quoting *U.S. ex rel. Portland Constr. Co. v. Weiss Pollution Control Corp.*, 532 F.2d 1009, 1013 (5th Cir. 1976).

Plaintiff therefore requests leave of the Court to file a one page Sur-Reply (excluding caption and signature block) to address Defendant’s arguments contained in its Reply.

Respectfully Submitted,

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ATTORNEY FOR PLAINTIFF

Certificate of Conference

The undersigned hereby certifies that he has attempted to confer with Defendant’s counsel, but was not able to communicate with her in time to receive a response. As such, it must be assumed that Defendant’s counsel is opposed to this Motion.

/s/ Douglas B. Welmaker
Douglas B. Welmaker

Certificate of Service

I hereby certify that the foregoing Motion for Leave to file a Sur Reply has been electronically served on all counsel of record via Notice of Electronic Filing on a known Filing User through the CM/ECF system on April 7, 2021.

/s/ Douglas B. Welmaker
Douglas B. Welmaker